STATE OF MICHIGAN

COURT OF APPEALS

GERALD LEROY YAX,

Plaintiff-Appellee,

UNPUBLISHED September 19, 2006

Wayne Circuit Court

LC No. 02-244644-NH

No. 260007

v

GARY HAWKINS KNAPP and GARY HAWKINS KNAPP, M.D., P.C.,

Defendants-Appellants,

and

CARL TOTTY BERGREN, M.D., CARL TOTTY BERGREN, M.D., P.C., OAKWOOD HOSPITAL & MEDICAL CENTER, d/b/a OAKWOOD HOSPITAL,

Defendants.

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendants Gary Knapp, M.D., and his professional corporation, Gary Knapp, M.D., P.C., appeal as of right from the trial court's amended judgment granting plaintiff's motion for judgment notwithstanding the verdict ("JNOV") and striking the jury's finding that plaintiff was 70 percent comparatively at fault for his injuries in this medical malpractice action. We reverse and remand.

I. Facts and Procedural History

Defendant was plaintiff's family practice physician. Plaintiff visited Dr. Knapp on January 2, 2001, presenting symptoms of pain and swelling in his left calf. Defendant diagnosed the symptoms as either deep vein thrombosis or a superficial blood clot. Defendant testified that

¹ The singular "defendant" shall refer to defendant Gary Knapp, M.D.

he informed plaintiff that deep vein thrombosis requires hospital treatment, and advised him to go to a hospital emergency room. According to defendant, plaintiff was unwilling to go, so defendant agreed to treat his condition as though it were a superficial blood clot, advised plaintiff to return to his office every 2 or 3 days, but also advised plaintiff to go to an emergency room if his condition worsened. Plaintiff visited defendant again on January 5 and 11, 2001, and reported that the swelling improved when he rested and elevated his leg. On January 22, 2001, plaintiff reported that the swelling was worse, and defendant ordered an ultrasound examination to be performed two days later. On January 24, 2001, the ultrasound revealed that plaintiff had deep vein thrombosis, and that the blood clot was propagating into plaintiff's upper thigh. Plaintiff received hospital treatment in January and March, 2001. Because of the delay in seeking treatment, plaintiff now suffers from post-phlebitic syndrome, a serious condition that will become progressively worse.

Plaintiff brought this action against defendants, claiming that defendant violated the appropriate standard of care for a family practice physician by failing to promptly obtain an ultrasound and recommend hospitalization when plaintiff presented symptoms of deep vein thrombosis on January 2, 2001. At trial, plaintiff's expert witnesses testified that plaintiff would have avoided serious complications if he had been promptly diagnosed and treated the first week of January 2001. Defendants raised the defense of comparative negligence, arguing that plaintiff negligently failed to follow defendant's advice to go to an emergency room.

The jury found that defendant was negligent, but apportioned fault by finding that plaintiff was 70 percent responsible for his injuries, and defendants 30 percent responsible. Plaintiff moved for JNOV, arguing that there was insufficient evidence to support the jury's finding of comparative negligence. The trial court agreed, and struck the jury's finding of comparative negligence. The trial court reasoned that the delay in diagnosis contributed to the severity of plaintiff's injury, but that there was no evidence that plaintiff's actions or lack thereof contributed to his injury. Referring to defendant's testimony regarding the appointments with plaintiff on January 2, 5 and 11, 2001, the trial court stated:

And I read Dr. Knapp's testimony. He says, well, in effect he says we're watching it. I told him he should go if it got worse, and that's what it was on all three occasions. There was never a directive to, I think you need to get this checked out. I want you to go here, and then Dr. Yax not doing it. It was always put in the situation of, well, if it got worse he needed to do that. And he kept seeing him and kept saying the same thing, if it got worse.

So in effect he was saying, well, we were watching it. That's just not enough. Had he said you need to go check it out, and then Dr. Yax didn't do it, yes, that would be enough. But in this case there was total equivocation on the part of Dr. Knapp. In his notes he thought it was a [deep vein thrombosis], however, he never told him. He says well he didn't want to [go to] a hospital, but it wasn't necessary to go to a hospital to have an ultrasound, so there just isn't enough here.

So I am setting aside the jury's finding of over fifty percent comparative negligence because it just isn't in the proofs.

II. Standard of Review

We review de novo a trial court's decision regarding a motion for JNOV. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). A motion for JNOV should be granted only when there is insufficient evidence presented to create an issue for the jury. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004). When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Id.* at 123-124. If the evidence is such that reasonable jurors could disagree, JNOV is improper. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

III. Analysis

Medical malpractice actions, like other actions for negligence, are subject to the doctrine of pure comparative negligence; therefore, the jury must determine the percentage of the total fault of all persons who contributed to the plaintiff's injuries, including each plaintiff. MCL 600.6304(1)(b) and (6)(b); *Shinholster v Annapolis Hosp*, 471 Mich 540, 551-553; 685 NW2d 275 (2004). The doctrine of comparative negligence is predicated on the assumption that an adult plaintiff has a duty to exercise reasonable care for his own safety and protection. *Laier v Kitchen*, 266 Mich App 482, 496; 702 NW2d 199 (2005).

The standards for determining the comparative negligence of a plaintiff are the same as those of a defendant—the jury must consider the nature of the conduct and its causal relationship to the damages—and the question is one for the jury unless all reasonable minds could not differ. MCL 600.6304(2); *Rodriguez v Solar of Michigan, Inc*, 191 Mich App 483, 488; 478 NW2d 914 (1991). The defendant has the burden of proving that the plaintiff's conduct was a cause of his own damages. *Lamp v Reynolds*, 249 Mich App 591, 599; 645 NW2d 311 (2002). Accordingly, a defendant must show that the plaintiff breached a general standard of reasonable care, i.e., that which a reasonably careful person would use under the circumstances. *Case v Consumers Power Co*, 463 Mich 1, 6-7; 615 NW2d 17 (2000).

Plaintiff contends that he would have avoided serious injury if he received prompt intervention in early January 2001. Plaintiff's experts, Drs. Sanford Lax and Martin Evans, supported this assertion by testifying that the propagation of plaintiff's blood clot would have been halted, and he would have avoided post-phlebitic syndrome, if he received proper anticoagulation treatment between January 2 and 11, 2001. Defendants do not dispute this contention; indeed, they rely on the testimony of plaintiff's experts to prove the causation element of their comparative negligence theory, which was that plaintiff was comparatively negligent in failing to follow defendant's advice to go to a hospital and obtain an ultrasound. The trial court held that there was no evidence that defendant had told plaintiff to go to the hospital for further treatment, and thus granted the JNOV motion.

Our review of the trial transcripts reveals that defendant did provide testimony that supported defendants' theory on comparative negligence. Specifically, defendant testified that he told plaintiff on January 2, 2001, that he might have either deep vein thrombosis or a superficial blood clot and that he should go to the hospital emergency room for diagnosis and treatment.² However, according to defendant, plaintiff objected to going to a hospital because his dental practice was very busy after the holiday break. Defendant testified to the following exchange regarding the January 2, 2001, appointment:

- Q. Now, you had a consideration of a couple conditions on January 2nd, did you make some recommendations to Dr. Yax?
- A. Yes, I did. I told him what he needed to do was go to Oakwood Hospital Emergency Room and seek treatment and then depending on what exam they did there, we would go from that point, either admit him for a deep vein or they would send him home for a superficial.

- Q. What did Dr. Yax think about your plan?
- A. Well, he said it's the first day after the holiday he was busy. He had patients scheduled and he didn't want to go to the emergency room. [Emphasis added.]

Defendant testified that because of plaintiff's objection to going to a hospital, he and plaintiff made a "deal":

He did not want to go to the hospital under any circumstances, and so I made a deal with him. And the deal was that we would treat it as superficial thrombosis, and have him back, and if he improved, we were on the right track. And if it did not improve, he was then to go to the hospital for a diagnosis and treatment.

I asked that while he's working he would take a break between patients whenever possible. Elevate his leg, and if it got worse, he was to not work and come back sooner than three days. [Emphasis added.]

Defendant also testified:

Q. It is your testimony, Doctor, that on January 2nd of 2001 you told Jerry Yax to go to the hospital to be worked up to determine whether he had a deep vein thrombosis?

² Defendant does not have hospital admitting privileges, so when a patient requires hospitalization, he refers him to another physician or instructs him to go to the emergency room.

A. Or superficial, yes.

- Q. Doctor, is it your position in this case that Dr. Yax did not follow your advise by going to the hospital for a workup on January 2nd, January 5th, and January 11 of 2001?
- A. On January 2^{nd} he did not.
- Q. Is it your opinion that you wanted him to do that and he wouldn't do it; is that your testimony?
- A. Correct.

While discussing his answers to pretrial interrogatories, defendant explained:

- Q. So in your answer in terms of what you said in interrogatories, after this lawsuit was filed and before your deposition was taken by me, you answered questions with regard to what recommendations, it was your position that you made that Jerry didn't follow, and with regard to your answers to those you said you recommend hospitalization on January 2nd. You don't recall whether you recommended it on the 5th, and you said nothing about recommending it on the 11th. Isn't that what you said when you answered these in May of 2003?
- A. No, that's not the way that should be interpreted. On the first day, January 2nd, I instructed him the only way this can be handled would be in the hospital because it can't be treated as an outpatient.

All right, on the next two dates, I didn't say you must go to the hospital. I said if things get worse you go to the hospital. . . . [Emphasis added.]

Plaintiff provided conflicting testimony regarding defendant's advice to him during the January 2, 2001, visit. Plaintiff testified that defendant told him that the pain in his leg was probably caused by a "blood clot," but defendant did not discuss the difference between superficial blood clots and deep vein thrombosis, or explain the dangers of the latter condition. He denied that defendant advised him to go to the emergency room or get an ultrasound on any of his visits on January 2, 5 or 11, 2001. He stated that he would have gone to the hospital or undergone an ultrasound if defendant had explained that further diagnosis was needed because deep vein thrombosis requires immediate attention.

The trial court found defendant's testimony to be "equivocal" and noted that "saying, well, we were watching [the condition]" was "just not enough." However, the trial court stated that "[h]ad he said you need to go check it out, and then Dr. Yax didn't do it, yes, that would be enough." A thorough review of the record reveals that, although disputed by plaintiff's testimony, defendant indeed testified that he advised plaintiff on January 2, 2001, to go to the hospital for diagnosis and treatment of a possible deep vein thrombosis and that plaintiff refused

to follow the recommendation.³ A jury is charged with weighing the credibility of witnesses and may reject or accept all or a portion of a witness's testimony. Kelly v Builders Square, Inc, 465 Mich 29, 39-40; 632 NW2d 912 (2001). Thus, it was not inconsistent with the evidence for the jury to believe defendant's testimony that he gave plaintiff medical advice which plaintiff There was also evidence that plaintiff was responsible for following refused to follow. defendant's advice for hospitalization. Dr. Sanford Lax testified that, assuming plaintiff was advised to go to the hospital, "there would be some responsibility on the part of the patient to follow the recommendation" Thus, there was evidence presented to the jury that allowed defendants to argue that plaintiff failed to adhere to a reasonable standard of care with respect to seeking treatment for his blood clot. Furthermore, there was evidence that plaintiff's refusal to follow defendant's recommendation affected his condition, as plaintiff's own experts testified that early treatment was crucial to avoiding post-phlebitic syndrome. Viewing the testimony in a light most favorable to defendants, we believe it supports a jury finding that plaintiff was comparatively negligent for disregarding defendant's medical advice to go to an emergency room on January 2, 2001.⁴ The trial court therefore erred in granting plaintiff's motion for JNOV, and in striking the jury's finding of comparative negligence.

Reversed and remanded for entry of an order reinstating the jury's verdict. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Michael R. Smolenski

/s/ Deborah A. Servitto

³ There was evidence that defendant could have accommodated plaintiff by scheduling an outpatient ultrasound, as he eventually did three weeks later, to rule out deep vein thrombosis. However, plaintiff objected to going to a hospital for an ultrasound because his dental practice was very busy after the holiday break. Although an outpatient clinic might have been more convenient, either testing location would have required plaintiff to interrupt his busy schedule. Thus, the jury could have concluded that defendant's failure to offer an alternative location for obtaining an ultrasound did not relieve plaintiff of his obligation to follow defendant's medical advice.

⁴ Having concluded that there was sufficient evidence to support the jury's finding of comparative negligence for plaintiff's failure to heed medical advice given on January 2, 2001, we will not address defendants' other arguments for reversal.